U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY McKINNEY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, St. Louis, MO

Docket No. 02-1212; Submitted on the Record;
Issued October 3, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a one percent impairment of the left upper extremity, for which she received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a written review of the record under 5 U.S.C. § 8124; and (3) whether the Office properly denied appellant's request for reconsideration without merit review of the claim.

On November 2, 1998 appellant, then a 59-year-old distribution clerk, filed a traumatic injury claim alleging that she injured her left elbow when she slipped and fell. The Office accepted the claim for a fracture of the left elbow and authorized open reduction and internal fixation of her left proximal ulnar fracture. Subsequently, the Office authorized exchange plating, hardware removal and bone graft.

Appellant filed a claim for a schedule award on November 2, 2000.

In an August 13, 2001 report, Dr. John A. Gragnani, a second opinion Board-certified physiatrist, concluded appellant had a one percent impairment of the left upper extremity. In support of this decision, Dr. Gragnani:

> "Using the A[merican] M[edical] A[ssociation], *Guides to the Evaluation of Permanent Impairment*, fifth edition, for range of motion losses Figures 16-34 and 16-37, pages 472 and 474 respectively were consulted. For flexion at 130 degrees, 1 percent of the upper extremity is given for loss of 10 degrees of flexion. For extension of 0 degrees, no rating is given. For supination and pronation, no rating is given since the ranges were well within normal range according to Figures 16-37, with 85 to 90 degrees of range of motion being recorded. Tables 16-11 and 16-10 were consulted for pain and loss of strength. These were felt to have been addressed adequately. It was not felt that they needed to be rated separately since this lady does not have continual pain but rather intermittent pain with usage. Therefore, range of motion was felt to have

addressed this. The only rating, therefore, in reference to the left elbow as the 1 degree for loss of flexion as calculated from Tables 16-34. Section 16-7 was consulted, and nothing was felt to be appropriate from this section."

In a report dated August 20, 2001, the Office medical adviser reviewed Dr. Gragnani's report and agreed that appellant had a one percent impairment of the left upper extremity.

On August 31, 2001 the Office issued a schedule award for a one percent impairment of the left upper extremity.

By letter dated October 1, 2001, appellant requested a written review of the record by a hearing representative.

On October 24, 2001 the Office denied appellant's request for a review of the written record by a hearing representative as untimely.

In a letter dated January 24, 2002, appellant requested reconsideration and attached her October 1, 2001 letter and October 24, 2001 Office decision in support of her request.

In a nonmerit decision dated February 6, 2002, the Office denied appellant's request for reconsideration.

The Board finds that appellant is not entitled to more than a one percent loss of use of the left upper extremity.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[3] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined.[4] The method used in making such determinations rests in the sound discretion of the Office.[5]

For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the use of the appropriate edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[6]

[1] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8107(c)(19).

[4] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[5] *George E. Williams*, 44 ECAB 530 (1993).

[6] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

In the instant case, the Office determined that appellant had a one percent permanent impairment of her left upper extremity by accepting the findings of Dr. Gragnani and the Office medical adviser who determined the precise impairment rating by gauging the lack of full flexion and full extension, together with the lack of full supination and full pronation, in appellant's left upper extremity based on the applicable figures and table of the A.M.A., *Guides.*

As the record contains no other probative evidence demonstrating that appellant had a permanent impairment of her left upper extremity greater than one percent, the reports by Dr. Gragnani and the Office medical adviser are the only evaluations of record of appellant's impairments that conform with the A.M.A., *Guides*, and the Board finds that they constitute the weight of the medical evidence in the case record and establish that appellant has no more than a one percent impairment of the left upper extremity.

Next, the Board further finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant … is entitled, on request made within 30 days after the date of the issue of the decision, to a hearing on his claim before a representative of the Secretary."[7] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[8] Thus, a claimant has a choice of requesting an oral argument or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

Section 10.616(a) of the Office's regulations[9] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date of marking of the date of the decision for which a hearing is sought."

The Board has held that the Office in its broad discretionary authority in the administration of the Act, has the power to hold hearings in circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[10] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[11] when the request is made after the 30-day period for requesting a hearing[12] and when the request is for a second hearing on the same issue.[13] The Office's procedures, which require

[7] 20 C.F.R. § 8124(b)(1).

[8] 20 C.F.R. § 10.615 (1999).

[9] 20 C.F.R. § 10.616(a) (1999).

[10] *Samuel R. Johnson*, 51 ECAB ___ (Docket No. 99-1228, August 1, 2000).

[11] *Rudolf Bermann*, 26 ECAB 354, 360 (1975).

[12] *Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[14]

In this case, appellant's October 1, 2001 request for a review of the written record was made more than 30 days after the date of issuance of the Office's August 31, 2001 decision. Therefore, the Office was correct in stating in its October 24, 2001 decision that appellant was not entitled to a review of the written record.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its October 24, 2001 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by the submission of additional evidence.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[15] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The Board also finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[17] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[18]

In this case, appellant did not meet any of the above requirements. Following the August 31, 2001 merit decision, appellant submitted a copy of her letter requesting a review of the written record and the Office's denial of her request. This evidence is not relevant to the issue of whether appellant is entitled to a greater than one percent impairment of the left upper extremity, for which she received a schedule award.

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[14] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[15] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[16] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[17] 20 C.F.R. § 10.606(b)(2).

[18] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

The Board finds that appellant did not submit any evidence prior to the February 6, 2002 Office decision that constitutes new and relevant evidence. She did not meet any of the requirements of section 10.606(b)(2) and, therefore, the Office properly denied her reconsideration request without merit review of the claim.

The decisions of the Office of Workers' Compensation Programs dated February 6, 2002 and October 24 and August 31, 2001 are hereby affirmed.

Dated, Washington, DC
October 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member